The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REBECCA COUSINEAU, individually on her own behalf and on behalf of all others similarly situated,

Plaintiff,

v.

MICROSOFT CORPORATION, a Delaware corporation,

Defendant.

Case No. 2:11-cv-01438-JCC

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

NOTE ON MOTION CALENDAR:
August 23, 2013

ORAL ARGUMENT REQUESTED

(FILED PARTIALLY UNDER SEAL)

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

TABLE OF CONTENTS

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

TABLE OF AUTHORITIES

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

STATUTES & FEDERAL RULES

OTHER AUTHORITIES

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

I. INTRODUCTION

From 2010 to 2011, Defendant Microsoft Corp. ("Microsoft") produced and sold the Windows Mobile 7 smartphone operating system ("WM7"), which, like other smartphone operating systems, offered location functionality, allowing consumers to use their locations in connection with certain applications and software. Microsoft designed one application, the native (i.e., pre-installed) Camera Application ("Camera"), such that the first time it opened, it would ask users whether or not they wanted to "share" their location with Camera and Microsoft (i.e., grant Microsoft access to their location information). [redacted] The problem, however—and where Microsoft violated its users' privacy rights—is that Microsoft designed WM7 in such a way that regardless of a User's choice to grant Camera (and with it Microsoft) access to their location data, Camera would access it anyway each time a User launched the application.

One such User, Plaintiff Rebecca Cousineau, left her WM7 phone's Master Location Switch on and chose to use location functionality for some applications (such as mapping and social networking applications) while denying permission to others, including Camera. Nonetheless, each time Cousineau opened Camera, Microsoft would access her [redacted] location data, even though she had specifically denied it permission to do so.

Cousineau is not alone, as every other WM7 user in the United States who left the Location Master Switch "on" but denied Camera access to his or her location data faced the same circumstances. As such, Cousineau now moves to certify a class of those individuals defined as:

> All WM7 Users who denied the Camera Application access to their location information, and then used the Camera Application with the Master Location Switch turned "on."

Cousineau's claims under the Stored Communications Act, 18 U.S.C. § 2701 ("SCA"), are

---

[1] Throughout this brief, a "User" denotes a consumer that used a smartphone running the WM7 operating system.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

particularly well-suited to class-wide resolution, as WM7's uniform design and operation ensures that for each individual who meets the simple and objective class definition, the right to relief under the SCA will be identical. If Cousineau's theory—that WM7's and Microsoft's access to her [redacted] location data using Camera constitutes unlawful access to a stored communication in violation of the SCA—holds, each and every Class member will have a right to the same relief under the Act. If Cousineau's theory fails, none of the Class members will be able to recover.

All of the proposed Class members have identical claims that will ultimately rise and fall with Cousineau's ability to prove her own case. Class-wide treatment is therefore appropriate to resolve this controversy and Plaintiff's claim is ripe for certification. Accordingly, Plaintiff Cousineau respectfully requests that the Court grant this motion for certification, appoint her as representative of the Class and her attorneys as Class Counsel, and award such other further relief as it deems necessary and just.

II. FACTUAL BACKGROUND

A. Microsoft Designed WM7 to Collect, Use, and Rely Upon [redacted].

When Microsoft launched WM7 in 2010, it was commonplace for smartphones to have the capacity to determine users' physical geo-locations.[2] Such location-awareness was (and is) a major selling point for smartphones—with it, consumers can find directions, "geo-tag" photos with location data, use apps to find nearby restaurants and movies, and do much more.[3] To compete with the mobile operating systems offered by Apple and Google, Microsoft designed WM7 with location functionality squarely in mind. (*See, e.g.*, Location Service Functional

---

[2] By 2011, at least 55% of all American adult smartphone users, and 28% of American adults in total, used "mobile or social location-based services of some kind." Kathryn Zickuhr & Aaron Smith, *28% of American Adults use mobile and social location-based services*, Pew Internet & American Life Project 4 (Sept. 6, 2011), *available at* http://www.pewinternet.org/~/media//Files/Reports/2011/PIP_Location-based-services.pdf.

[3] *See id.* at 2.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

Specification, Ex. A at 507 – 08.)[4]

For WM7, location functionality relied predominantly on [redacted]. (*See id.*; *see also* Wi-Fi/Cell Location Resolution and Caching and Tiling and Design Document, Ex. B at 667; Location W-Fi/Cell Functional Specification, Ex. G at 730; Expert Report of Craig Snead ("Snead Rpt."), Ex. D at 4 –5.) [redacted] (Ex. B at 667; Snead Rpt. at 5.) [redacted].[5] (*See* Dep. Tr. of Sandeep Deo ("Deo Tr."), Ex. E at 81:7 – 83:5; Snead Rpt.at 5 – 6.) [redacted] (*See* Dep. Tr. of Cristina Del Amo Casado ("Del Amo Casado Tr."), Ex. F at 181:22 – 183:5; Ex. G at 732.) [redacted] (*See* Del Amo Casado Tr. at 181:22 – 183:12; Ex. A at 523 – 524; Ex. G at 732.)

From the operating system provider's perspective, [redacted]

---

[4] All references to Exhibit Numbers (here, "Ex. A"), refer to exhibits described in and attached to the Declaration of Rafey S. Balabanian ("Balabanian Decl."), submitted concurrently herewith. References to specific page numbers from Microsoft's document production refer to the unique Bates Number designations as marked by Microsoft (e.g., here, pages "507 – 08" reference the pages marked MS-COUS_00000507 – 508).

[5] This concept is, perhaps, easiest to understand through a rough example: [redacted]

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

[redacted].[6] (Ex. A at 559; Location Crowd Sourcing Functional Specification, Ex. C at 692 – 693.) [redacted] (Ex. A at 559 (recognizing that [redacted]); Deo Tr. at 100:17 – 101:14.) [redacted][7] (Ex. C at 693; Snead Rpt. at 7 – 8.) [redacted] (Ex. C at 694; Snead Rpt. at 7 – 8.) [redacted] (Ex. C at 692; *see also* Del Amo Casado Tr. at 47:3 – 50:14; Deo Dep. 85:19 – 87:25; Snead Rpt. at 8.) [redacted] (Deo Tr. at 99:22 – 100:16), [redacted] (Ex. A at 532 – 533; Del Amo Casado Tr. at 182:4 – 183:25.) [redacted]

---

[6] In contrast, while more resource-intensive, GPS positioning does not require [redacted], as all requests for positioning rely on direct satellite-to-phone communications. *See generally* Lauren Drell, *How Does GPS Know Where You Are?* Mashable (Nov. 16, 2012), *available at* http://mashable.com/2012/11/16/gps/; (*see also* Del Amo Casado Tr. 56:15 – 58:10.)

[7] As a first, short-term response, [redacted]. (Del Amo Casado Tr. 60:21 – 61:24; Deo Tr. 102:1 – 103:3.)

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

[redacted]. (Del Amo Casado Tr. at 186:9 – 188:10.)

For its part, even Microsoft recognized that [redacted] (Ex. C at 692.) [redacted][8] (*See id.* at 692 – 694; Snead Rpt. at 8.)

B. Microsoft Designed WM7's Camera to Access and Collect Users' Location Data Irrespective of User Consent.

WM7's pre-installed Camera, by design, was [redacted].[9] (Ex. A at 511 – 12; Snead Rpt. at 11 – 12.) [redacted] (Location UX Functional Specification, Ex. H at 1301 – 1302; Dep. Tr. of Adam Lydick ("Lydick Tr."), Ex. I at. 91:15 –

[8] For a period of time, Microsoft was [redacted]. (Microsoft Email Thread, Ex. J at 632 – 636; Deo Tr. at 55:16 – 58:15; Del Amo Casado Tr. at 165:17 – 20.) In May of 2011, however, Microsoft [redacted]. (Deo Tr. at 49:11 – 50:9; Del Amo Casado Tr. at 177:2 – 9.) That decision came after Microsoft received a letter from Congress inquiring into its location privacy practices and referencing recent press coverage of location privacy issues afflicting Microsoft's competitors. (Letter from Rep. Fred Upton, Chairman of the Committee on Energy and Commerce, et al. to Steve Ballmer, Microsoft Corp. Chief Executive Officer (Apr. 25, 2011), Ex. K.) At the same time, numerous class action complaints were already pending against Apple, which had received a similar letter of inquiry from Congress. These cases were later consolidated into *In re Phone/iPad Application Consumer Privacy Litig.*, MDL 2250, 2011 WL 3557452 (Aug. 8, 2011), which is still pending.

[9] The detailed technical interaction between Camera and [redacted] is described in the Snead Rpt.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

93:4; Snead Rpt. at 7 – 8, 12 – 14.) The Master Location Switch, in turn, could only be toggled off through the WM7 setting menus, and remained "on" by default. (Ex. H at 1302; Del Amo Casado Tr. at 152:22 – 153:8.)

As for Camera, [redacted]. (Del Amo Casado Tr. at 100:13 – 17; Lydick Tr. at 48:5 – 48:18, 76:23 – 77:2, 91:15 – 94:11; Snead Rpt. 11 – 12.) That resolution followed a uniform process, which was (in all ways relevant to this litigation) unaffected by a User's decision to *not* allow Camera to access his or her location information. (Lydick Tr. at 48:5 – 48:18, 76:23 – 77:2, 91:15 – 94:11.) As such, and beginning with the very first time Camera was launched, Camera would [redacted] (Lydick Tr. at 45:15 – 46:9; Snead Rpt. at 12 – 14.) Upon receipt of that request, [redacted]. (Del Amo Casado Tr. at 100:3 – 17; Snead Rpt. at 13). [redacted] (Ex. B at 677; Del Amo Casado Tr. at 105:4 – 106:12; Snead Rpt. at 13), [redacted] (Ex. B at 677; Del Amo Casado Tr. at 101:18 – 22; Snead Rpt. at 13 – 14), or [redacted]. (Ex. B at 677; *see* Del Amo Casado Tr. at 47:3 – 50:14, 52:16 – 53:24; Snead Rpt. at 14.) [redacted]. (Del Amo Casado Tr. at 113:4 – 14; Lydick Tr. at 93:9 – 13; Snead Rpt. at 14.)

This same process occurred when the Camera was launched for the very first time, at which time a consent prompt was displayed to the user, asking:

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

> **Allow the camera to use your location?**
>
> Sharing this information will add a location tag to your pictures so you can see where your pictures were taken. This information also helps us provide you with improved location services. We won't use the information to identify or contact you.

(3d Am. Compl. ¶ 4 (Dkt. 64); Microsoft Answer to 3d Am. Compl. ¶ 4 (Dkt. 65).)[10] In response, a User was given two choices: "allow" or "cancel." (*Id.*) If a User selected "cancel," then the Camera was designed to [redacted] (Lydick Tr. at 87:11 – 23.) However, the User's selection had no bearing on [redacted]. (Lydick Tr. at 48:5 – 18, 76:23 – 77:2, 91:15 – 94:11.) In summary, *every* time Camera was launched, it would *always* [redacted], (*id.*,) [redacted],[11] (Del Amo Casado Tr. at 100:13 – 100:17.)

C. Microsoft Violated the Stored Communications Act by Accessing Plaintiff's Location Information After She Denied It Permission To Do So.

Plaintiff Rebecca Cousineau obtained a new Samsung smartphone around June 2011, which came preinstalled with the WM7 operating system. When she started the phone for the first time, its Master Location Switch defaulted to the "on" position. (Ex. H at 1302.) While running WM7, Cousineau never changed the Master Location Switch setting, nor did she change any other setting through WM7's "settings" menu. (Dep. Tr. of Rebecca Cousineau ("Cousineau Dep."), Ex. M at 41:24 – 43:18, 44:13 –15, 45:17 – 47:15.) When Cousineau opened Camera for the first time, she was presented with the standard consent prompt discussed above. (*Id.* at 74:17 – 23.) Not wishing to have her location shared with Microsoft or otherwise accessed while using Camera, Cousineau selected "cancel." (*Id.*) As she continued to use WM7, Cousineau also used

---

[10] While this text doesn't explain with whom a user is choosing to "share" location information, a pre-release version of the same text explained that [redacted] (Camera Experience Functional Specification, Ex. N at 204 (emphasis added).) That explanation—i.e., [redacted]—describes the same functionality addressed by the final consent prompt, and makes clear that the user is being asked to share location information with Microsoft. (Dep. Tr. of Shamik Bandyopadhyay ("Bandyopadhyay Tr."), Ex. O at 49:9 – 50:23.)

[11] The one exception being where a user set his or her "Master Location Switch" to "off." (Ex. H at 1302.)

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

Camera, often as part of her job and in conjunction with the inspection of rental properties or evictions. (*See id.* at 34:24 – 36:7, 62:21 – 63:5, 71:15 – 71:20.) Despite her decision to select "cancel," Camera continued [redacted] *See supra* Section II.B.

Through her Third Amended Complaint, Cousineau alleges a single claim under the SCA. (Dkt. 64 at ¶¶ 41 – 48.) The putative Class—all WM7 Users in the United States who denied the Camera Application access to their location information, and then used the Camera Application with the Master Location Switch turned "on"—faces common factual and legal questions which certification will answer for everyone. The key factual inquiries look to Microsoft's practice of accessing, or attempting to access, [redacted] location information from Users' WM7 Devices, when Users expressly denied Microsoft access to that same information. Pursuant to that common factual core, the common legal question asks whether such access (or attempted access) constitutes unauthorized or otherwise unlawful access to stored electronic communications in violation of the SCA.

III. ARGUMENT

This Court should certify the proposed Class because it is ascertainable and satisfies the requirements of Federal Rule of Civil Procedure 23. Certification is appropriate when the proposed class meets Rule 23(a)'s four requirements—numerosity, commonality, typicality, and adequacy of representation—and satisfies one of Rule 23(b)'s subparts. *See* Fed. R. Civ. P. 23(a), (b). Plaintiff seeks certification under Rule 23(b)(3), which requires that (1) common questions of law or fact predominate, and (2) classwide adjudication provides a superior method of resolving the controversy. Fed. R. Civ. P. 23(b)(3).

As fully explained herein, the proposed Class satisfies Rule 23's requirements. Consequently, the ascertainable Class proposed is well suited for certification. To protect the rights of those who have no means of individually adjudicating their claims, this Court should grant Plaintiff's motion for Class certification.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

A. The Class Is Ascertainable Because It Is Defined by Reference to Entirely Objective Criteria.

A party seeking class certification must demonstrate that "the class definition [is] 'definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member.'" *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 566 (W.D. Wash. 2012) (quoting *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)). Administrative feasibility does not turn on whether a ready list of putative class members exists, *O'Connor*, 184 F.R.D. at 319 (citation omitted), but rather asks whether "[t]he class definition provides sufficiently precise and objective criteria to determine class membership." *Agne*, 286 F.R.D. at 566; *see also* Herbert B. Newberg, Newberg on Class Actions § 3:1 (William B. Rubenstein & Alba Conte, eds., 5th ed.).

Stated otherwise, courts regularly find proposed classes are ascertainable where "a prospective plaintiff could easily identify himself or herself as having a right to recovery based on the description in the class definition."[12] Newberg, *supra*, § 3:3; *see, e.g.*, *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 593 – 94 (C.D. Cal. 2008) (holding class ascertainable where plaintiffs could determine whether they owned the particular make and model of vehicle at issue in the lawsuit); *Pigford v. Glickman*, 182 F.R.D. 341, 346 (D.D.C. 1998) ("The Court concludes that the parameters of the proposed class as defined by plaintiffs in this case are sufficiently clear to make the proposed class administratively manageable; by looking at the class definition, counsel and putative class members can easily ascertain whether they are members of the class.").

Here, the proposed Class definition is both objective and precise because liability will track Microsoft's common conduct—the design and function of WM7's Camera and [redacted]

[12] And, to these points, in cases where a list of class members is unavailable at the time of certification, many courts have permitted putative class members to self-identify through sworn affidavits submitted in conjunction with claim forms. *See, e.g.*, *CE Design v. Beaty Const., Inc.*, 07 C 3340, 2009 WL 192481, at *4 (N.D. Ill. Jan. 26, 2009) (requiring "potential plaintiffs that come forward . . . to represent to the Court—via affidavit and under the penalty of perjury—that they received the fax [from the defendant] on the dates in issue"; *see also Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D. Ill. 2012) (permitting class members who threw away voided gift cards at issue to submit signed affidavits attesting to prior ownership).

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

[redacted]. To that end, two objective criteria govern whether a given User is included in the Class: (1) that User must have denied Camera permission to "use [his/her] location" and thereafter (2) used Camera with the WM7 Master Location Switch in the default "on" position. The precision of these questions—and, therefore, the Class definition itself—is buttressed by the fact that Class membership does not vary with other extrinsic variables. It makes no difference whether, for example, a User was (or was not) connected to Wi-Fi or cell networks when Camera was opened; a User took (or did not take) a photograph using Camera; or a User used Camera when recent location data was (or was not) [redacted]

Rather, the merit of every Class member's claim depends exclusively on the design and functionality of WM7 itself. If a User launched Camera—at any time—the application necessarily [redacted]. (Lydick Tr. at 48:5 – 48:18, 76:23 – 77:2, 91:15 – 94:11; Snead Rpt. at 11 – 12.) So long as the Master Location Switch was set to "on"—which it was by default (Ex. H at 1302)—[redacted]. (Del Amo Casado Tr. at 100:13 – 17; *see also* Lydick Tr. at 91:15 – 94:11; Snead Rpt. at 11 – 14.) Looking forward, because both inquiries rely entirely on information within each prospective Class members' knowledge (i.e., neither requires insight into the inner workings of WM7, or the ephemeral circumstances attendant to those instances where Camera was accessed), all such individuals can determine whether they have a right to recovery if Plaintiff prevails on her SCA claim. *See* Newberg, *supra*, § 3:3.

In sum, these objective criteria—stemming from the design and function of WM7—ensure that it is administratively feasible for the Court and WM7 Users alike to ascertain whether an individual is a member of the proposed Class. Thus, the proposed definition is ascertainable.

B. The Class Satisfies Rule 23(a)'s Four Requirements.

The Class meets Rule 23(a)'s four requirements because the proposed Class (1) is

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

sufficiently numerous, (2) faces common questions of law and fact, (3) features a named Plaintiff whose claims are typical of the Class, and (4) is adequately represented by the named Plaintiff and counsel. Fed. R. Civ. P. 23(a); *Agne*, 286 F.R.D. at 565 – 70. As shown below, the Class consists of at least 187,000 identically situated persons whose common experiences relating to WM7 can be uniformly and collectively resolved through a single SCA claim. And because those common issues directly track Cousineau's own facts and claims, Cousineau's certification motion should be granted.

1. The Class is sufficiently numerous because thousands of location-enabled Users—among the millions who used a WM7 Device—denied Camera access to location information.

For a Class to be certified, it must satisfy Rule 23's requirement that "the class is so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 – 14 (9th Cir. 1964) (quoting *Adver. Specialty Nat'l Ass'n v. Fed. Trade Comm'n*, 238 F.2d 108, 119 (1st Cir. 1956)). While no "magic number" is required for a class to be numerous, *McCluskey v. Trs. of Red Dot Corp. Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 673 (W.D. Wash. 2010), "[i]n general, courts find the requirement satisfied when a class includes at least 40 members." *Z.D. ex rel. J.D. v. Group Health Coop.*, C11-1119RSL, 2012 WL 1977962, at *3 (W.D. Wash. June 1, 2012); *see also* Newberg, *supra*, § 3:12. Expert testimony is frequently used to establish numerosity under Rule 23. *See, e.g.*, *Munoz v. Giumarra Vineyards Corp.*, 1:09-CV-00703-AWI, 2012 WL 2617553, at *22, 29 (E.D. Cal. July 5, 2012); *Manno v. Healthcare Revenue Recovery Grp., LLC*, 11-61357, 2013 WL 1283881, at *684 n.3 (S.D. Fla. Mar. 26, 2013).

Here, while the precise number of Class members is presently unknown, the existing evidence suggests that there are at least 187,000 putative Class members. (Good Rpt. at 2 – 4.) Cousineau retained one of the nation's foremost experts relating to consumer privacy choices and preferences, (*see id.* at 1 – 2), whose research shows that 96.5% of all smartphone users use their

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

phone's camera application, 18.5% of whom leave location services activated for some apps but not for their camera. (*Id.* at 4 – 6.) Thus, 17.9% of smartphone users—like the putative Class members—use their phone's camera application, but deny it !""#$%&'%(#)*+location while leaving their phone's location functionality enabled. (*Id.*) Accordingly, based on publicly available data showing that at least 1,080,000 people used WM7 devices during the Class period, roughly 193,000 (and at least 187,000) of them fit the Class definition. (*Id.* at 4.) As such, and with at least 187,000 potential Plaintiffs, joinder is impracticable and the numerosity requirement is met.

2. Classwide resolution will provide uniform answers to common questions of whether (1) the WM7 device constitutes a "facility," (2) that holds location information in "electronic storage," (3) which Defendant accessed without permission.

The proposed Class meets the commonality requirement because Plaintiff seeks answers to questions of law and fact that will commonly determine Defendant's liability to her and every other Class member. Because these common questions turn on design and functionality inherent to every WM7 device, those answers will be the same for all Class members, ensuring that all Class members will have a uniform right to recovery.

Rule 23 requires that all putative Classes show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *Agne*, 286 F.RD. at 567. Further, a class action must also be capable of generating "common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Stated otherwise, commonality arises when plaintiffs suffer the same injury. *Wal-Mart*, 131 S. Ct. at 2551. The commonality requirement is "construed permissively." *Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D. 504, 522 (C.D. Cal. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998)) *leave to appeal denied*, No. 12-80138, 2012 WL 7152289 (9th Cir. Nov. 9, 2012); *see also Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 647 (W.D. Wash. 2007) (citing *Hanlon*, 150 F.3d at 1011) ("Courts have described the showing required to meet the

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

commonality requirement as 'minimal' and 'not high.'"). As such, a degree of factual variation does not defeat commonality, which exists as long as the circumstances of each particular class member "retain a common core of factual or legal issues." *Parra v. Bashas', Inc.*, 536 F.3d 975, 978 – 79 (9th Cir. 2008).

Here, Plaintiff's SCA claim stems from a factual and legal core common to each and every putative Class member by virtue of the WM7's uniform design and functionality. To establish Microsoft's liability under the SCA, all Class members seek answers to the same three questions: (1) whether a WM7 Device is a facility through which an electronic communication service ("ECS") is provided, (2) whether location information stored on the device is a communication housed in electronic storage, and (3) whether Microsoft accessed this information without User consent. *See* 18 U.S.C. § 2701(a). Indeed, in seeking an interlocutory appeal, Microsoft recognized the first two issues as "controlling questions of law." (Microsoft's Mot. for Cert. Pursuant to 28 U.S.C. § 1292(b) and to Stay (Dkt. 39) at 1:10 – 1:12.) Plaintiff now seeks classwide resolution of these same legal questions, along with the factual question of whether Microsoft had authorization to access her and other Class members' location data. Ultimately, because the answers sought all depend on WM7's inherent design and functionality, common answers are guaranteed.

a. Whether the WM7 device is a "facility through which an [ECS] is provided."

To pursue her claim under the SCA, Plaintiff first asks whether the WM7 device constitutes a "facility through which an [ECS] is provided." Whether a particular device, such as a smartphone, constitutes a facility is a common issue ripe for classwide resolution. *See, e.g.*, *Harris v. comScore, Inc.*, No. 11 C 5807, 2013 WL 1339262, at *9 n.6 (N.D. Ill. Apr. 2, 2013) ("The issue of whether personal computers are 'facilities' under the SCA, which the court need not resolve at this time, is . . . common to the entire class.") And, here, this Court already expressed its "satisf[action] that a mobile device can be a facility for purposes of the SCA." (Order Granting in Part and Denying in Part Def.'s Mot. to Dismiss (Dkt. 38) at 10 – 11; *see also*

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

Order Denying Def.'s Mot. for § 1292(b) Cert. and to Stay (Dkt. 47) at 3 (additionally noting that whether a *given* mobile phone is a "facility" under the SCA may turn on factual matters relevant to the manner in which a device "store[s] location data").) In any event, the common design of WM7 will answer this question uniformly for each and every Class member.

As for the latter half of the question—whether the WM7 device is a facility *through which ECS are provided*—the identical design of WM7 and Microsoft's overall suite of location services will, again, provide a common answer for the Class. The SCA defines an ECS as a service that enables users "to send or receive wire or electronic communications." 18 U.S.C. § 2510(15) (2012). While this Court has already found that Microsoft "is an ECS provider for the purposes of the SCA"—inasmuch as it provides certain location services through its servers, including through Orion—discovery has also shown that Class members' WM7 devices are, themselves, "facilit[ies] through which ECS [are] provided." (Dkt. 38 at 11 – 12 (finding that, at the pleading stage, "it is plausible that a device on which [WM7] operates is a facility through which ECS is provided.") As described above, Class members' WM7 Devices store location information and, . (Del Amo Casado Tr. at 100:13 – 101:13; Snead Rpt. at 12 – 13). That initial access does not involve . (Ex. B at 677; Del Amo Casado Tr. at 84:17 – 25, 100:3-101:13; 105:20 – 106:2.) . (Ex. B at 677; Del Amo Casado Tr. at 100:3 – 101:13; Snead Rpt. at 13.) (Ex. B at 677; Del Amo Casado Tr. at 105:4 – 106:12; Snead Rpt. at 13) (Ex. B at 677; Del Amo Casado Tr. at 101:18 – 22; Snead Rpt. at 13 – 14), . (Ex. B at 677; Del Amo Casado Tr. at 47:3 – 50:14; Snead Rpt. at 14.) For the purposes of this motion, these facts more than confirm this

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

Court's observation that Microsoft might provide "geolocation services . . . both . . . in its installation of [WM7] on a phone *and* [in its] support[] [of those services] by its servers." (Dkt. 38 at 12:2 – 12:4.) Furnishing these services—remotely via server *and* locally through the Device—constitutes the remote and local provision of an ECS.

In any event, and regardless of the outcome as to the merits of Cousineau's SCA claim, the common design and function of the WM7 operating system guarantees that the answer to the "facility" question will be common to each and every Class member.

b. Whether the WM7 device held location information in "electronic storage."

The second common question ripe for class-wide resolution is whether Plaintiff's location data, [redacted], was a communication held in "electronic storage." The SCA defines "electronic storage" as "(a) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (b) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C § 2510(17). Again, the common design of WM7 guarantees a common answer to this question—and, once again, discovery strongly suggests that it will be answered in the affirmative.

As explained above, [redacted]. (Del Amo Casado Tr. at 100:13 – 101:9; Snead Rpt. at 13.) That [redacted] information consists of a User's [redacted] location data—i.e., [redacted] (Ex. B at 673 – 675; Del Amo Casado Tr. at 100:3 – 17; Snead Rpt. at 5 – 7.) As a User moves about in the world, [redacted] (Del Amo Casado Tr. at 46:6 – 47:2.) [redacted] (Ex. B at 668; Del Amo Casado Tr. at 40:2 – 9; Snead Rpt. at 5 – 7.)

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

Even Microsoft acknowledges that RAM, by nature, is temporary. Microsoft, *Memory and Storage*, http://windows.microsoft.com/en-us/windows7/memory-and-storage (last visited July 26, 2013) (defining RAM as "temporary storage space"); *see also MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 938 (9th Cir. 2010), *amended on denial of reh'g* 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011); *see also In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1059 (N.D. Cal. 2012) (holding that location information stored on device's hard drive for up to one year was not "temporary"). Congress intended the SCA's definition of "electronic storage" to encompass RAM. S. Rep. No. 99-541, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3570 ("The term 'electronic storage' . . . covers storage within the random access memory of a computer.").

Regardless of the Court's ultimate determination on the merits, each putative Class member's claims would involve the same type of data (personal location information) stored in an identical manner ([redacted]). (*See* Del Amo Casado Tr. at 40:2 – 9, 100:3 – 17; Snead Rpt. at 5 – 7.) Accordingly, whether the WM7 device held location information in temporary storage is a question common to all Users, and can be resolved on a class-wide basis.

c. Whether Defendant accessed location information held in temporary storage without User consent.

Finally, this litigation will commonly determine whether Microsoft accessed Users' location information without their consent. A party violates the SCA when it accesses "a facility through which an [ECS] is provided" without authorization. 18 U.S.C. § 2701. Unauthorized "access" under the SCA does not require the actual examination of the contents of a particular electronic communication—rather, it "merely involves *being in position* to acquire the contents of a communication." *United States v. Smith*, 155 F.3d 1051, 1058 (9th Cir. 1998) (emphasis added); *see also Petrakis v. Shefts*, 10-CV-1104, 2011 WL 5930469, at *5 (C.D. Ill. Nov. 29, 2011) (noting that defendant need not read contents of emails in order to "access" them).

As with the other questions key to this litigation, the question of "authorization" and "access" turns entirely on the uniform design and functionality of every WM7 device. Regarding

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

authorization, Microsoft uniformly *required* that Users either grant or refuse consent to "[a]llow the camera to use your location"—by requiring input to the consent prompt that was launched when Camera was opened for the first time. (Lydick Tr. at 76:10 – 77:14, 107:21 – 108:7; Bandyopadhyay Tr. at 57:24 – 58:23; Snead Rpt. at 9 – 11.) Regarding access, and irrespective of a User's choice made through the consent prompt,[13] Microsoft designed WM7 [redacted]. (Del Amo Casado Tr. at 100:13 – 101:9; Lydick Tr. at 29:5 – 30:13, 89:14 – 90:7, 92:13 – 94:11; Snead Rpt. at 11 – 14.) And as discussed above, that resolution could also involve a number of different functions *after* [redacted], (Ex. B at 677; Del Amo Casado Tr. at 101:18 – 22; Snead Rpt. at 13 – 14), [redacted], (Ex. B at 677; Del Amo Casado Tr. at 105:4 – 106:12; Snead Rpt. at 13), [redacted]. (Ex. B at 677; Del Amo Casado Tr. at 47:3 – 50:14; Snead Rpt. at 14.) In any event, for Users who did not consent (i.e., for Class members), Microsoft's act of [redacted] constitutes unauthorized access, even if the [redacted] location information was only a null value.

At this juncture, and regardless of the ultimate merits outcome, it only matters that each of the above common questions will necessarily generate common answers for each and every Class member. That commonality flows from the common design of WM7 and, for each individual within the Class definition, exists regardless of any individualized circumstances.

3. Cousineau's claims are typical because she has been injured by the same course of conduct as all Class members—Defendant's unauthorized access of location data [redacted].

Cousineau's claims are typical of the Class. Rule 23(a)(3) provides that a representative party's claims or defenses must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3); *Agne*, 286 F.R.D. at 568. Under the Rule's permissive standards, the representative

[13] As explained above, Microsoft only honored Users' choices relating to whether or not photos were "geotagged"—but not relating to whether location information was shared.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

claims need only be "reasonably co-extensive" with those of the class—not "substantially identical." *Hanlon*, 150 F.3d at 1020. The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiff[], and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citing *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal.1985)). Typicality tends to merge with commonality. *Gen. Tele. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

No unique factual circumstances distinguish Cousineau from other Class members, and her claims are typical for at least three reasons. First, like everyone included in the Class definition, Cousineau's Master Location Switch was "on" by default—a setting that she never changed while her phone ran WM7. (Cousineau Tr. at 42:4 – 43:18.) To the extent additional corroboration is helpful, her documented past usage of location services for other purposes (e.g., to obtain directions and local restaurant and hotel recommendations, and to "check in" through her Facebook application) shows that it was enabled at the time she used Camera. (*See id.* 47:22 – 49:4; Cousineau Decl., Ex. P at ¶¶ 3 – 7.) Second, like all Class members, Cousineau selected "cancel" when prompted to let Camera access her location and never reversed that choice by changing any internal settings. (Cousineau Tr. at 42:4 – 43:18.) Finally, like all Class members, Cousineau was injured when Defendant accessed her location information [redacted] without her consent. (*Id.* at 13:11 – 16:1.) That access occurred as a result of Microsoft's uniform design of (1) Camera, (2) [redacted], and (3) the programmed interaction between the two components.

In sum, because Cousineau has suffered the same injury as all Class members, as a result of Microsoft's identical conduct, her claim is typical of the proposed Class. Indeed, Cousineau's claim will rise and fall with those of the Class.

4. Cousineau and her counsel have no conflicts with and are committed to adequately representing the proposed Class.

Finally, Rule 23(a)(4) requires that the representative parties "fairly and adequately

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see also Agne*, 286 F.R.D. at 569. The adequacy requirement is met when (1) the named plaintiff has no conflicts of interest with other class members, and (2) the named plaintiff and his or her counsel "prosecute the action vigorously on behalf of the class." *Hanlon*, 150 F.3d at 1020 (citation omitted). In a complex case, a named plaintiff's ability to summarize the subject matter of the lawsuit is indicative of adequacy. *Buus v. WAMU Pension Plan*, 251 F.R.D. 578, 587 (W.D. Wash. 2008). Counsel's experience litigating similar cases also weighs in favor of adequacy. *See Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008).

Cousineau's interests are aligned with those of the Class, and she is committed to prosecuting her claims on a representative basis. (Balabanian Decl. at ¶¶ 3 – 4.) Cousineau has been an active participant throughout this case, having reviewed filings (including each pleading), participated in answering Microsoft's discovery requests, and traveled to Chicago to testify at length in a deposition about her experience with her WM7 device. (*Id.*) Through her testimony, Cousineau has demonstrated a firm grasp of the subject matter of this lawsuit. (*See, e.g.*, Cousineau Tr. at 13:11 – 16:1.) She has also voiced strong personal and professional concerns about her privacy, (*id.* at 34:24 – 36:7, 110:4 – 113:8), confirming that she will continue to prosecute the action vigorously on behalf of the Class. As she put it, her motivation is to act as a "voice" for others, not to enrich herself. (*Id.* at 65:5 – 65:12.)

Finally, Plaintiff's counsel are well-respected members of the legal community, have regularly engaged in major complex litigation, and have had extensive experience in consumer class actions involving similar issues of similar size, scope and complexity as this case. (*See* Firm Resume of Edelson LLC, Ex. U; *see also* Declaration of Kim D. Stephens, filed concurrently herewith). Proposed Class Counsel have committed (and will continue to commit) significant resources to the successful prosecution of this case. (Balabanian Decl. at ¶ 7.) As such, the attorneys representing Plaintiff are more than qualified to serve as Class Counsel.

C. The Class Satisfies the Requirements of Rule 23(b)(3).

In addition to meeting the criteria of Rule 23(a), the Class satisfies Rule 23(b)(3)'s two

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

requirements: that common questions of law or fact predominate, and that classwide adjudication is the superior method of resolution. Fed. R. Civ. P. 23(b)(3); *see Agne*, 286 F.R.D. at 570 – 72. Certification under Rule 23(b)(3) is appropriate and encouraged "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022 (quoting 7A Charles Alan Wright et al. *Federal Practice and Procedure* § 1777 (2d ed.)).

Where a proposed class meets Rule 23(b)(3)'s requirements, the class action mechanism has a "practical utility . . . achiev[ing] economies of time, effort, and expense." *Murray v. Fin. Visions, Inc.*, No. CV-07-2578-PHX-FJM, 2008 WL 4850328, at *4 (D. Ariz. Nov. 7, 2008); *see also* Fed. R. Civ. P. 23(b)(3) advisory committee's note. A case such as this—where individual recoveries for Class members would be small and almost certainly not be pursued but for classwide litigation—exemplifies the class action's practical utility. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."). This Court should therefore find the requirements of Rule 23(b)(3) satisfied.

1. Common issues regarding the design and functionality of the WM7 device predominate over any individual questions.

The predominance requirement is satisfied because *every* key question at issue in this case stems from WM7's uniform design and functionality, ensuring that no uniquely individual concerns are at stake. Although it is a more demanding standard than commonality, the predominance requirement is satisfied when a proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "[W]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Hanlon*, 150 F.3d at 1022 (quoting Wright, *supra*, § 1778). The predominance test "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund,*

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011). When a plaintiff advances a theory of liability in its certification motion, the court should determine whether common issues predominate without evaluating the theory itself. *U.S. Steel, Paper, & Forestry, Rubber, Mfg. Energy Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir. 2010).

Plaintiff has presented a cognizable and unified theory of liability. As described in Section III.B.2, *supra*, each Class member's claim arises under the same federal statute and hinges on WM7's uniform design and functionality. That uniformity generates three driving questions—(1) whether the WM7 device is a "facility through which an [ECS] is provided;" (2) whether [redacted] location data stored [redacted] constitutes communications in "electronic storage;" and (3) whether Defendant accessed (or attempted to access) that location data without authorization. If the answer to those questions is "yes," then the Class will have a uniform right to recovery under the Act. Likewise, if the answer to any of them is "no," the Class will uniformly have no right to recovery.

Under Plaintiff's theory, Defendant intentionally designed WM7 to not only disregard Users' choices to allow or prohibit Microsoft's access to temporarily stored location data, but also, when possible, to use that access to both "improve [its] location services" and gain ground against its marketplace competitors. *See supra* §§ II.A – B. Critically, individualized facts and circumstances—such as whether Users took pictures with Camera, had stable network connections when using Camera, or even had recent location information [redacted]—have no bearing on Cousineau's central theory. Where, as here, no individual matters trump the common issues that predominate this case, the first requirement of Rule 23(b)(3) is satisfied.

2. A class action is a superior means of adjudicating this controversy.

The proposed Class also meets Rule 23(b)'s second requirement—that class resolution be "superior to other methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

23(b)(3); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). In assessing superiority, courts examine a non-exclusive list of factors including (1) whether any related litigation has already commenced, (2) the desirability of the chosen forum, (3) the class members' interests in pursuing individual litigation, and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A) – (D); *Wolin*, 617 F.3d at 1175. As to the first and second factors, Plaintiff is unaware of any related litigation among class members or any difficulties as to the forum where Defendant resides. The third and fourth factors also weigh in favor of certification, as Users pursuing small statutory claims share a strong interest in combining litigation into a single action and manageability concerns are not so great as to outweigh the advantages of a class action.

As to the third factor, class members' interests favor the pursuit of class, rather than individual, resolution of their claims. "Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin*, 617 F.3d at 1175 – 76 (holding class action was superior where "filing hundreds of individual lawsuits . . . could involve duplicating discovery and costs that exceed the extent of proposed class members' individual injuries"); *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001) ("Where damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action."). Pursuit of small statutory penalties is "costly and duplicative." *Bellows v. NCO Fin. Sys., Inc.*, No. 3:07-CV-01413-W-AJB, 2008 WL 4155361, at *8 (S.D. Cal. Sept. 5, 2008). Conversely, class members have a greater interest in pursuing individual litigation when individual damages are high. *See Zinser*, 253 F.3d at 1190 – 91 (holding individual litigation preferable where minimum claim was $50,000 for each class member).

This case is well suited for class treatment because the claims of the Plaintiff and proposed Class involve identical violations of the SCA. Plaintiffs principally seek recovery of $1,000 per person in statutory damages under 18 U.S.C. § 2707(c) (2012). (Dkt. 64 at 12:2 – 3.)

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

Absent a class action, litigation of individual claims for such a small recovery is cost prohibitive. *See Zisner*, 253 F.3d at 1190. An award of $1,000, even with the availability of attorneys' fees, is simply insufficient to justify the risk and cost of litigation against a corporation such as Microsoft and, indeed, class members would struggle to find attorneys willing to bring individual actions to remedy Microsoft's conduct. Class members are therefore best served in this case by pooling their resources into a single proceeding, making a class action the superior method of resolving the controversy.

As to the fourth factor, no actual or perceived manageability concerns outweigh the superiority of a class action. Manageability refers to "the whole range of practical problems that may render the class action format inappropriate for a particular suit," such as the calculation of individual damages, distribution of damages, and notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974). Cases that involve numerous and substantial individual issues, or varying state law causes of action, may pose management difficulties. *See Zinser*, 253 F.3d at 1192; *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 654 (C.D. Cal. 1996).

Significantly, manageability is only a factor if it outweighs the overall superiority of a class action. *See Santoro v. Aargon Agency, Inc.*, 252 F.R.D. 675, 686 – 87 (D. Nev. 2008); *see also* 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 5:68 (9th ed.); Newberg, *supra*, § 4:72. Courts do not assess manageability in the abstract, but instead examine "how the problems that might occur in managing a class suit compare to the problems that would occur in managing litigation without a class suit." Newberg, *supra*, § 4:72; *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004) *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 (2008) ("[W]e are not assessing whether this class action will create significant management problems, but instead determining ***whether it will create relatively more management problems than any of the alternatives***.") (emphasis added). Courts are unlikely to deny certification based on potential management difficulties alone. *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 148 (C.D. Cal. 2007).

Here, no manageability issues warrant denial of certification. The single claim at issue in

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

this lawsuit arises under one federal statute. As described in Section III.B.2, *supra*, the questions that must be answered to determine Defendant's liability are not individual to class members, but common to the Class by virtue of WM7's common design and functionality. Further still, nothing about certification will create manageability issues relative to individual litigation, *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358 (11th Cir. 2009), as Class and individual litigation alike would involve intense inquiry regarding WM7's functionality and additionally look to WM7 user representations that (1) they denied Camera permission to log their location, and (2) used Camera while the Master Location Switch was enabled. *See supra* Section III.A. The main difference, however, that ultimately reveals why the class action mechanism is far superior to individual adjudication of these issues, is that when it comes to individual litigation, such an inquiry would need to be conducted thousands of times.

In the end, because Class members have no other realistic means of pursuing $1,000 statutory claims against Microsoft manageability concerns do not outweigh the superiority of a class action. Plaintiffs should be permitted to combine their SCA claims together in a single class-wide proceeding, the superior method of resolving this controversy.

IV. CONCLUSION

For the reasons stated above, the proposed Class satisfies Rule 23's requirements. In clicking cancel, Plaintiff and the Class made a conscious choice to protect their privacy, believing that Defendant would respect their decisions. By designing WM7 to access location information [redacted], Defendant disregarded their choice. The SCA claim at issue in this lawsuit hinges on common questions to which the Class seeks uniform answers. Accordingly, Plaintiff respectfully requests that this Court grant certification under Rule 23 and permit this case to move forward as a class action.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992

Dated: July 29, 2013

Respectfully submitted,

REBECCA COUSINEAU,
individually on her own behalf and on behalf of all others similarly situated,

/s/ Rafey S. Balabanian
One of Plaintiff's Attorneys

Jay Edelson*
Rafey S. Balabanian*
Ari J. Scharg*
Chandler R. Givens*
J. Dominick Larry*
EDELSON LLC
350 North LaSalle, Suite 1300
Chicago, Illinois 60654
Telephone: (312) 589-6370
Facsimile: (312) 589-6378
jedelson@edelson.com
rbalabanian@edelson.com
ascharg@edelson.com
cgivens@edelson.com
nlarry@edelson.com

**Admitted pro hac vice*

By: /s/ Kim D. Stephens
One of Plaintiff's Attorneys

Kim D. Stephens, WSBA #11984
Janissa A. Strabuk, WSBA # 21827
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
Telephone: (206) 682-5600
Facsimile: (206) 682-2992
kstephens@tousley.com
jstrabuk@tousley.com

Counsel for Plaintiff Rebecca Cousineau and the Putative Class

CERTIFICATE OF SERVICE

I, J. Dominick Larry, an attorney, hereby certify that on July 29, 2013, I served the above and foregoing Plaintiff's Motion for Class Certification by causing true and accurate copies of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

/s/ J. Dominick Larry

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL 206-682-5600 • FAX 206-682-2992